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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 591

COOPERATIVE TRANSIT COMPANY, COOPERATIVE BUS COMPANY, AND THE COOPERATIVE BUS COMPANY, CORPORATIONS,

Petitioners,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 591

COOPERATIVE TRANSIT COMPANY, COOPERATIVE BUS COMPANY, AND THE COOPERATIVE BUS COMPANY, EACH A CORPORATION,

Petitioners,

vs.

STATE ROAD COMMISSION OF WEST VIRGINIA.

PETITION.

The petitioners, Cooperative Transit Company, Cooperative Bus Company, and The Cooperative Bus Company, each a corporation, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia, entered in the above cause on the thirtieth day of August, 1943, refusing a rehearing of an order (dated July 20, 1943) refusing a writ of prohibition to the State Road Commission of West Virginia (R. 14).

Opinion Below.

The Supreme Court of Appeals of West Virginia wrote no opinion.

Jurisdiction.

The order refusing rehearing was entered by the Supreme Court of Appeals of West Virginia, on the thirtieth day of August, 1943 (R. 14). The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347 (a)). Time for filing this Certiorari was extended to January 29, 1944, by order of this Court, dated November 15, 1943 (R. 20).

Questions Presented.

1. Whether the State of West Virginia in the absence of Congressional action has jurisdiction in view of the Commerce Clause of the Constitution (Constitution, Art. 1, Sec. 8) to control the rates of toll of interstate bridges over the Ohio River, separating the States of West Virginia and Ohio, and physically in both states.

2. Whether or not the State Road Commission of West Virginia has jurisdiction to fix tolls for the stream of vehicular traffic originating in the State of Ohio and terminating in the State of West Virginia, and originating in West Virginia and terminating in the State of Ohio, after crossing the Ohio River between Bridgeport, Ohio, and Wheeling, West Virginia, on traffic bridges erected over the Ohio River at that point, the west shore of said river at low water mark being the boundary between the two states, or whether the exclusive jurisdiction of tolls over these interstate bridges is vested in the Secretary of War of the United States by virtue of the General Bridge Act of 1906, 34 Stat. 85 § 494; 33 U. S. C. (33 U. S. C. A. § 494) and its two amendments (1930), 46 U. S. Stat. at L. 82 (33 U. S. C. A. § 498 b) (1935) c. 597 § 2, et seq., 49 Stat. 671 (33 U. S. C. A. 504).

3. Whether or not the exclusive Federal jurisdiction is conceded by the Legislature of West Virginia, by virtue

of the fact that the Legislative Act, under which the State Road Commission purported to act, recognizes the supremacy of the Federal Government in relation to tolls, Chap. 17, Art. 17, Section 22, Code of West Virginia, Michie Serial § 1681.

4. Whether the rates of toll of the petitioner, Cooperative Transit Company, are within the jurisdiction of the Interstate Commerce Commission, since three of the four bridges (constituting two complete spans of bridges) from the State of West Virginia to the State of Ohio are railroad bridges within the statutory definition of the Interstate Commerce Act, 49 U. S. C. A. § 1, Paragraph 1 (a) and Paragraph 3.

5. Whether or not the refusal of prohibition by the Supreme Court of Appeals of the State of West Virginia, directed to the State Road Commission of West Virginia, forbidding its exercise of jurisdiction over the tolls of the bridges in question is a deprivation of a right in petitioners to have the tolls set in the manner and form provided by Congress of the United States derived from the Commerce Clause of the Constitution, forbidding direct control of interstate commerce by a state, and declared in the General Bridge Act of 1906 and its amendments (and as to railroad bridges in the Interstate Commerce Act); and, in consequence, is a denial of the equal protection of the laws, and a deprivation of property of petitioners without due process of law, within the meaning of Section I of Article XIV of the Amendments to the Constitution of the United States.

Statutes Involved.

1. The General Bridge Act of 1906 entitled "An Act to Regulate Construction of Bridges over Navigable Waters" approved March 23, 1906 (§ 4), 34 Stat. 85, § 494, T. 33 U. S. C. (33 U. S. C. A. § 494).

2. The amendment to the General Bridge Act of 1930 (Act June 27, 1930, 46 U. S. Stat. at L. 82, 33 U. S. C. A. § 498 b) extending the act to the regulation of toll of certain bridges.

3. Act of December 17, 1872 (17 U. S. Stat. at L. 398 and § 7 3d).

4. Act of February 14, 1883 (22 U. S. Stat. at L. 414 and § 5 thereof).

(These Acts in part specify the bridges to which the amendment of 1930 applies.)

5. The Amendment to the General Bridge Act of 1935 (Act August 21, 1935, C. 597, § 2, et seq., 49 Stat. 671, 33 U. S. C. A. 504) extends the jurisdiction of the General Bridge Act of 1906 to tolls over *any* bridge over any of the navigable waters of the United States when used in interstate commerce (with exceptions not pertinent).

6. Commerce Clause of the United States of America (Const. Art. 1, Sec. 8).

7. Act West Virginia Legislature (Official West Virginia Code, Chapter 17, Article 17, Section 22, serial § 1681), West Virginia, under which the State Road Commission purported to act, which recognizes the supremacy of Federal law in regulating the rates of bridges.

Article 8, Section 3, Constitution of West Virginia; Chapter 51, Art. 1, Sec. 3, Official Code of West Virginia; giving to the Supreme Court of Appeals of West Virginia original jurisdiction in prohibition.

Interstate Commerce Act, 49 U. S. C. A. § 1, paragraph 1 (a) and paragraph 3.

Statement.

Two complete bridge systems span the Ohio River between Wheeling, West Virginia and the State of Ohio.

Two sections of these bridges span the waters between the east or West Virginia shore of the Ohio River and Wheeling Island in the River (a part of West Virginia), and two of these bridges connect said Island and the Ohio or Western shore. The bridges are partly in the State of West Virginia and partly in the State of Ohio (R. 2). The Island is in West Virginia, and is a part of the City of Wheeling. The Ohio River is navigable. Thus one section of each bridge system extends from West Virginia to the Island and another section from said island to the State of Ohio, both sections constituting an interstate bridge over the Ohio River. Four bridges, therefore, constitute the two complete bridge systems, each consisting of two spans.

Three of the bridges or spans carry the tracks of one of the petitioners—the Cooperative Transit Company—an interurban electric car line—which, with its two subsidiary bus companies (also petitioners), are employee-owned and operated and engaged in interstate commerce and carry mail as well as passengers (R. 4, 12). The use of these bridges to petitioners is vital and necessary to their interstate traffic. The Transit Company owns the tracks on one of the bridges and all of the overhead special facilities upon all of the bridges used by them and maintains a five-cent fare for transit to and from the states of West Virginia and Ohio (R. 12). The Transit Company is obliged to operate its schedules pursuant to the requirements of the Interstate Commerce Commission (R. 4).

Cooperative Bus Company and The Cooperative Bus Company operate buses over said bridges in interstate commerce and in pursuance of the regulations of the Interstate Commerce Commission (R. 4).

The City of Wheeling bought these bridges March 26, 1941 (R. 4). The City claimed the absolute power to fix rates of toll from the State of Ohio into West Virginia and the reverse over these bridges without let or hin-

drance or responsibility to any regulating body; the City immediately freed the bridges or spans connecting the City of Wheeling and the Island of all tolls and transferred the tolls to the bridges connecting the Island and the Ohio shore, increasing the tolls collected at the Ohio-West Virginia boundary (of all traffic from Ohio into West Virginia and from West Virginia into Ohio) to pay for the maintenance and purchase of all four bridges and not alone those which merely connected the Island and the Ohio shore. The effect of this was to make the traffic between the City of Wheeling and the Island free of tolls and to compel those obliged to use the other two bridges or spans connecting the Island and the State of Ohio, and coming from Ohio to West Virginia, or going from West Virginia to the State of Ohio, to pay for all four bridges or spans (R. 4).

The Public Service Commission of West Virginia and the Supreme Court of Appeals of West Virginia (see *Village of Bridgeport* v. *The City of Wheeling, et al.* (1943) — W. Va. —, 24 S. E. (2d) 285) refused to confirm the power of the City to fix and regulate tolls over the bridge.

The City on March 26, 1943, in a new proceeding, by petition, then requested the Public Service Commission of West Virginia to regulate its tolls (R. 7). In this proceeding the petitioners appeared specially and objected to the jurisdiction of the Public Service Commission of West Virginia (R. 3).

The Public Service Commission ignored the objections and, by an order dated May 5, 1943, fixed rates of toll on all traffic whether moving from the State of Ohio into West Virginia or the reverse, that is, from the State of West Virginia into Ohio, over only the two bridges or spans between the Island and the Ohio shore, but authorizing tolls to be collected sufficient in amount to maintain and

pay for all four bridges or spans and, in so doing, destroyed long-existing classifications of traffic and increasing petitioners' tolls one hundred and fifty (150) per cent (R. 7).

Petitioners asked for suspension and review and petitioned for a writ of prohibition in the Supreme Court of Appeals of West Virginia, pending which the State of West Virginia purchased the bridges and the State Road Commission of West Virginia assumed control of all four bridges and asserted a right to fix and regulate tolls by its own exclusive and unregulated authority, acting under an Act of the Legislature of West Virginia, which provided that all tolls should be subject

> "* * * to any applicable law or regulation of the United States of America now in force or hereafter to be enacted or made * * *" (Official W. Va. Code, Chap. 17, Art. 17, Sec. 22, Serial § 1681) (R. 8).

The State Road Commission announced its intention of maintaining the same rates of toll on the two bridges or spans connecting the Island and the State of Ohio, which the Public Service Commission had set upon the petition of the City of Wheeling (R. 3).

Petitioners thereupon petitioned the Supreme Court of Appeals of West Virginia for a writ of prohibition against the State Road Commission, based upon the lack of state authority to regulate tolls over interstate boundary bridges over navigable streams and the fact that exclusive authority is fixed in the Secretary of War to regulate tolls by the General Bridge Act of 1906 and its two amendments and pointing to the provisions of the Interstate Commerce Act providing for Federal jurisdiction over railroad bridges.

The Supreme Court of Appeals of West Virginia denied the Writ (R. 1) and refused a rehearing (R. 14) and this application followed.

The Supreme Court of Appeals of West Virginia wrote no opinion, but entered an order simply denying the writ of prohibition (R. 1) and refused a rehearing (R. 14). There is no prior written opinion, nor one in a companion case. In a separate case (*Village of Bridgeport* v. *City of Wheeling*) not reported, however, the Court in an order (copy of which is appended to the brief, p. 25) refusing the City of Wheeling suspension and review of an order of the Public Service Commission of West Virginia, in reference to a restoration of former rates over the same bridges, set out three grounds for its action, viz. (a) No specific legislation pertaining to the subject matter has been enacted by Congress. (b) No regulatory action has been taken by the Interstate Commerce Commission or Secretary of War. (c) The matters involved were merely local (R. 6).

Rulings of the Court Below.

The Supreme Court of Appeals of West Virginia, by a divided court, entered an order on July 20, 1943, refusing prohibition (R. 1) without opinion. Upon petition for rehearing (R. 14, 15, 16), petitioners invited a statement of reasons for refusing the prohibition, whether or not the papers were technically insufficient and setting up that it was a matter of substantive right for petitioners to know as to where jurisdiction lay. The Court denied rehearing and prohibition by an order entered August 30, 1943, without an opinion (R. 14).

Specification of Error to Be Urged.

The Supreme Court of Appeals of West Virginia erred in refusing the writ of prohibition for usurpation of authority, because the State Road Commission was without a shadow of power directly to control the rates of toll of the interstate boundary bridges in question in view of

(a) The Commerce Clause of the Constitution

(b) The General Bridge Act of 1906 and its 1930 and 1935 Amendments
(c) The Interstate Commerce Act.

Reasons for Granting the Writ.

There is here presented a question of conflict of jurisdiction concerning interstate commerce between the National Government on the one hand and the State of West Virginia on the other, of which the final arbiter must be this Court. Petitioners have completely exhausted their remedy in the West Virginia courts.

1. The Commerce Clause of the Constitution prevents any state imposing a direct control upon interstate commerce, whether or not the Congress has acted. The holding of the Supreme Court of Appeals of West Virginia is in direct conflict with the decision of this Court in *Covington v. Cincinnati Bridge Co.* (1893), 154 U. S. 204, which struck down an attempt of the State of Kentucky to regulate the rates of toll of a bridge over the Ohio River at Cincinnati between the States of Ohio and Kentucky.

2. The General Bridge Act of 1906 and its two amendments of 1930 and 1935 has not been specifically and directly construed by the Supreme Court of the United States, although the Circuit Court of Appeals for the District of Columbia in *Clarksburg-Columbus Short Route Bridge Co. v. Woodring* (1937), 89 Fed. (2d) 788 (Reversed on other grounds (1938) 302 U. S. 658), decided specifically that the control of rates of two bridges between the states of West Virginia and Ohio, over the Ohio River, was within the jurisdiction of the Secretary of War. There are numerous other cases where his jurisdiction has been recognized.

The stream of traffic which flows over the bridges in question is national and a part of the daily movement on the great arterial highway of Route 40 of the old National

Road and its laterals and feeders, both east and west of these bridges (R. 9). The imposition of rates by the West Virginia Road Commission directly affects the whole movement of traffic and particularly that of petitioners whose operations and fares are both as to its electric car and bus business controlled by the Interstate Commerce Commission. The necessity for coordination of the elements of interstate carriage of both fares to passengers and rates of toll over the bridges in one central authority is imperative.

3. The Act of West Virginia (Official Code of West Virginia, Chap. 17, Art. 17, Sec. 22, Ser. § 1681) under which the State Road Commission of West Virginia purported to act recognizes the paramount authority of the Congress of the United States.

4. The authority of the Secretary of War is either exclusive or it is non-existent.

5. As a practical matter, the underlying reasons for the constitutional surrender by the states of national control of instruments of interstate commerce to the National Government are clear-cut in the case of a bridge forming part of a great National Highway System (Route 40, or the National Pike) and especially so in the circumstance of the petitioners, whose rates are controlled by national authorities, through the Interstate Commerce Commission, constant confusion and aggravation would follow any concession of authority in the states to control part of the stream of transcontinental commerce.

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